

**JAN 31 2006**

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U.S. BKCY. APP. PANEL  
OF THE NINTH CIRCUIT**

**ORDERED PUBLISHED**

**UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT**

In re:	)	BAP Nos.	EC-05-1086-BMaS
	)		EC-05-1087-BMaS
CRAIG TIPPETT; CHRISTINE	)		(Related Cases)
L. TIPPETT,	)		
	)	Bk. No.	01-26241-C-7
Debtors.	)		
	)	Adv. No.	03-02326-C

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IRWIN MORTGAGE COMPANY;  
SEITU O. COLEMAN,  
Appellants,

v.

**O P I N I O N**

CRAIG TIPPETT; CHRISTINE L.  
TIPPETT; MICHAEL F. BURKART,  
Chapter 7 Trustee; UNITED  
STATES TRUSTEE/SACRAMENTO;  
CALIFORNIA RURAL HOME  
MORTGAGE FINANCE AUTHORITY,  
Appellees.

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Argued and Submitted on October 20, 2005 at  
Sacramento, California

Filed - January 31, 2006

Appeal from the United States Bankruptcy Court  
for the Eastern District of California

Honorable Christopher M. Klein, Bankruptcy Judge, Presiding

Before: BRANDT, MARLAR, and SMITH, Bankruptcy Judges.

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1 BRANDT, Bankruptcy Judge:

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3 Without authorization and without disclosing their bankruptcy,  
4 chapter 7<sup>1</sup> debtors Craig and Christine Tippett sold their home to  
5 appellant Seitu Coleman, paid off secured lienholders, and kept the net  
6 proceeds. A few months later, their trustee filed an adversary  
7 proceeding seeking turnover, quieting of title, and avoidance of the  
8 liens of Coleman's lenders, appellant Irwin Mortgage Company ("Irwin")  
9 and California Rural Home Mortgage Finance Authority ("CRHMFA")  
10 (jointly, "Lenders").

11 Coleman and Irwin moved in the main case for annulment of the  
12 automatic stay under § 362(d) to give retroactive effect to the sale and  
13 the liens. After trial on stipulated facts, the bankruptcy court  
14 concluded that the transfers to Coleman and Lenders were void as  
15 violations of the automatic stay, and that, as there was no "transfer,"  
16 they had no bona fide purchaser defense under § 549(c). The court also  
17 found no cause to annul the stay retroactively.

18 The court entered judgment in the adversary proceeding against  
19 Coleman and Lenders, declaring title to the property vested in the  
20 trustee, avoiding Lenders' liens, but granting them an equitable lien in  
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22 <sup>1</sup> Absent contrary indication, all "Code," chapter and section  
23 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330 prior to  
24 its amendment by the Bankruptcy Abuse Prevention and Consumer  
25 Protection Act of 2005, Pub. L. 119-8, 119 Stat. 23, as the case from  
26 which the adversary proceeding and these appeals arise was filed  
27 before its effective date (generally 17 October 2005).

28 All "Rule" references are to the Federal Rules of Bankruptcy  
Procedure, and all "FRCP" references are to the Federal Rules of Civil  
Procedure.

All "CCP" references are to the California Code of Civil  
Procedure.

1 the amount of debtors' home loan paid off in closing. It also entered  
2 an order in the main case denying annulment of the automatic stay.  
3 Coleman and Irwin appealed. CRHMFA, having defaulted in the adversary  
4 proceeding, did not participate in the appeal.

5 Concluding that the automatic stay of § 362 does not invalidate  
6 debtors' transfer of the property, we REVERSE the order and judgment  
7 declaring the transfer and liens void, and DISMISS as MOOT the appeal of  
8 the order denying the motion to annul.

9  
10 **I. FACTS**

11 Tippetts filed a joint chapter 7 petition in May of 2001, and  
12 appellee Michael Burkart was appointed trustee. They scheduled their  
13 residence in Sacramento County, California (the "Property") for  
14 \$140,000, and two liens against it totaling \$134,958. They claimed  
15 \$5042 exempt under CCP § 703.140(b)(1) & (5). Soon after filing they  
16 amended their exemption in the Property to \$1530, the balance of their  
17 wildcard exemption. No one recorded notice of the petition in the  
18 county recorder's office. § 549(c).

19 Tippetts received their discharge in November 2001, but the case  
20 remained open for determination of their disputed exemption claims and  
21 while the trustee administered other estate property. They continued to  
22 live in the Property. In early November 2002, without revealing their  
23 bankruptcy, debtors retained a realtor and listed the Property for sale  
24 for \$230,000. Shortly after, and without knowing of these events, the  
25 trustee wrote to debtors' attorney requesting their cooperation in  
26 marketing the Property because he believed that there might be equity of  
27 up to \$55,000 available for unsecured creditors, based on the general  
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1 appreciation of real estate in 2002, and projecting a sale price of  
2 approximately \$190,000. He sent a copy of his letter to debtors. There  
3 is nothing in the record or briefs evidencing any other communication  
4 between debtors and the trustee.

5 In April 2003, Coleman, whom all parties agree is a bona fide  
6 purchaser, bought the Property for \$225,000. On 23 April he signed a  
7 purchase money note in favor of Irwin for \$221,865, secured by a deed of  
8 trust on the Property, which was duly recorded with the grant deed and  
9 CRHMFA's lien of \$6900. After escrow paid off \$130,557.90 in  
10 prepetition encumbrances, Tippetts received net proceeds of \$76,582.76,  
11 exceeding both their claimed exemption and any available to them under  
12 California law.

13 Upon learning from their counsel that Tippetts had sold the  
14 Property, the trustee filed an adversary proceeding against them,  
15 Coleman, and Lenders, seeking turnover of the sale proceeds under § 542,  
16 and to avoid lenders' liens and quiet title. He also sought to revoke  
17 their discharge under § 727(d)(2), for knowingly and fraudulently  
18 selling an asset of the estate and retaining the net proceeds.

19 Coleman and Irwin jointly moved in the main case to annul the stay  
20 under § 362(d), seeking to validate the sale and the liens. The  
21 bankruptcy court denied the motion without prejudice, continuing the  
22 final hearing pending determination of the adversary proceeding. The  
23 bankruptcy court bifurcated the adversary proceeding and has not yet  
24 ruled on discharge revocation.

25 After trial on stipulated facts, the bankruptcy court adopted the  
26 stipulated facts as its findings and concluded that:

1 (1) Tippetts willfully violated the automatic stay by  
2 exercising control over property of the estate, and Lenders  
3 violated the automatic stay (albeit not willfully) by placing  
4 liens on the Property, and thus the deed and the Lenders'  
5 liens were void ab initio;

6 (2) Annulment under § 362(d) was unwarranted, as there was  
7 always equity in the Property, and the court would not have  
8 granted prospective relief from the stay had it been sought  
9 before the sale; and that

10 (3) § 549(c) is not a defense to the trustee's action, as it  
11 is not an exception to the automatic stay and there had been  
12 no § 549(a) transfer.

13 Transcript, 10 February 2005, pp. 96-103.

14 The bankruptcy court quieted title in the trustee, but granted  
15 Lenders an equitable lien to place them in the same position as if they  
16 had purchased the note secured by the prepetition lien. Id. at 104-105.  
17 The March 2005 judgment, which the bankruptcy court certified as final  
18 under FRCP 54(b), applicable via Rule 7054, provided in part:

19 The deed from Mr. and Mrs. Tippett to Mr. Coleman . . . is  
20 void, and Mr. Coleman has no ownership interest in the  
[Property]. The deeds of trust executed by Mr. Coleman in  
21 favor of Irwin . . . and California Rural Home Mortgage. . .  
are void. However Irwin . . . and California Rural Home  
22 Mortgage Finance Authority have an equitable lien against the  
[Property], to secure an obligation in the amount of  
\$130,557.90 . . . [to be paid out of sale proceeds].  
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24 The bankruptcy court expressly declined to consider (as do we) the  
25 possible availability of non-bankruptcy remedies, such as recovery for  
26 breach of escrow instructions or a claim against title insurance.  
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1 Coleman and Irwin timely appealed the Annulment Order, No. 05-1086,  
2 and Judgment, No. 05-1087. The bankruptcy court stayed both orders,  
3 allowing Coleman to remain in possession upon certain conditions,  
4 including posting a bond.

## 5 6 **II. JURISDICTION**

7 The bankruptcy court had jurisdiction via 28 U.S.C. § 1334 and  
8 § 157(a), (b) (1), and (b) (2) (E), (G), and (K). We do under 28 U.S.C.  
9 § 158(c).

## 10 **III. ISSUE**

11 Whether the automatic stay of § 362(a) voids debtors' unauthorized  
12 transfer of estate property.

## 13 14 **IV. STANDARD OF REVIEW**

15 We review conclusions of law and questions of statutory  
16 interpretation, including construction of the Code, de novo. In re  
17 Staffer, 262 B.R. 80, 82 (9th Cir. BAP 2001), aff'd, 306 F.3d 967 (9th  
18 Cir. 2002).

## 19 20 **V. DISCUSSION**

21 The fundamental question presented is whether the automatic stay of  
22 § 362(a) applies to a debtor's sale of estate property. The bankruptcy  
23 court found that the transfers of the trust deed and the creation of  
24 lenders' liens were acts in violation of the automatic stay, void ab  
25 initio under In re Schwartz, 954 F.2d 569, 571 (9th Cir. 1992).

26 The filing of a bankruptcy petition automatically stays "any act to  
27 obtain possession of property of the estate or of property from the  
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1 estate or to exercise control over property of the estate[.]”  
2 § 362(a)(3). That section is applicable to all entities and would  
3 appear to bar transfer of estate property by debtors.

4 A debtor’s legal and equitable interests at the start of the case,  
5 which are made “property of the estate” by § 541(a)(1), depend on state  
6 law. Butner v. U.S., 440 U.S. 48, 54-55 (1979); In re Lowenschuss, 170  
7 F.3d 923, 929 (9th Cir. 1999); see also In re Eisen, 31 F.3d 1447, 1451  
8 n.2 (9th Cir. 1994) (debtor’s assets pass to trustee upon appointment).  
9 Prepetition, Tippetts held recorded title to a fee simple interest in  
10 the Property. Appellants concede that, upon filing, equitable title  
11 passed to the trustee, and that the Property was property of the estate  
12 within the bankruptcy court’s jurisdiction. Nevertheless, they argue,  
13 Tippetts continued to hold record title, In re Cady, 266 B.R. 172, 181  
14 (9th Cir. BAP 2001), aff’d, 315 F.3d 1121 (9th Cir. 2003), which they  
15 could effectively transfer.

16 The lynchpin of the trustee’s theory is that all of debtors’  
17 interests in the Property passed to the estate upon filing, so they had  
18 no interest to transfer when they executed their deed to Coleman, and  
19 the Lenders’ deeds of trust depend upon his title.

20 But Section 549(a) implies that debtors may effect a valid  
21 transfer:

22 [T]he trustee may avoid a transfer of property of  
23 the estate -  
24 (1) that occurs after the commencement of the  
25 case; and  
26 (2). . . (B) that is not authorized under this  
27 title or by the court.

28 See 5 Alan N. Resnick and Henry J. Sommer, eds., Collier on Bankruptcy  
29 ¶ 549.02[1] (15th ed. rev. 2005) (“During the period of its control the

1 debtor or debtor in possession may dispose of property, for example by  
2 using it to pay prepetition debts or by transferring it for less than  
3 equivalent value, however improper that may be.”) The proposition is  
4 that since Congress provided a mechanism to undo (or avoid) a transfer  
5 of estate property, it obviously contemplated that there could be an  
6 unauthorized transfer of estate property postpetition.

7 If every exercise of control over estate property which is neither  
8 excepted from the stay in § 362(b) nor done with relief from the stay  
9 granted by the court is a stay violation and thereby void, then there  
10 can never be an unauthorized postpetition transfer. Every postpetition  
11 transfer would be void, including those of a trustee or debtor-in-  
12 possession in the ordinary course of business, expressly authorized by  
13 § 363(c).

14 And the trustee’s interpretation would also render § 549 largely  
15 meaningless - all that would remain would be the trustee’s power to  
16 avoid under § 549(a)(2)(A) postpetition transfers authorized by  
17 §§ 303(f)<sup>2</sup> and 542(c)<sup>3</sup> - contrary to the tenets of statutory  
18 construction. See FCC v. NextWave Personal Communications, Inc., 537  
19 U.S. 293, 302 (2003) (rejecting an interpretation of the Code that would  
20 render provisions inoperative); United Sav. Ass’n v. Timbers of Inwood  
21 Forest Assocs., Ltd., 484 U.S. 365, 369-71 (1988) (same). Further, to  
22 the extent they conflict, we must give effect to § 549, the more  
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25 <sup>2</sup> Business transactions by a putative debtor after the filing  
26 of an involuntary petition and before an order for relief.

27 <sup>3</sup> Good faith transfers of estate property to third parties or  
28 payments to debtor by entities without actual knowledge or actual  
notice of the commencement of a case against the debtor.

1 specific provision, over the more general provision, § 362. In re  
2 Padilla, 222 F.3d 1184, 1192 (9th Cir. 2000). Finally:

3 "the words of a statute must be read in their context and with  
4 a view to their place in the overall statutory scheme." Our  
5 goal in interpreting a statute is to understand the statute  
"as a symmetrical and coherent regulatory scheme" and to "fit,  
if possible, all parts into a . . . harmonious whole."

6 American Bankers Ass'n v. Gould, 412 F.3d 1081, 1086 (9th Cir. 2005)  
7 (citing Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S.  
8 120, 133 (2000)).

9 But before undertaking statutory construction ourselves, we must  
10 determine what weight to give the Ninth Circuit's statement in Schwartz,  
11 954 F.2d at 574, that the "automatic stay does not apply to sales or  
12 transfers of property initiated by the debtor[,] " a case in which it  
13 interpreted § 362.

14 We have interpreted Schwartz to mean that § 549 "does not apply to  
15 creditor-initiated transactions that violate the automatic stay, but  
16 only to debtor-initiated transactions that do not violate the stay." In  
17 re Mitchell, 279 B.R. 839, 842 (9th Cir. BAP 2002). See also Cady, 266  
18 B.R. at 179 n.4 (interpreting Schwartz). While those cases involved  
19 creditor-initiated, rather than debtor-initiated, transactions, their  
20 reasoning is consistent with the canons of statutory interpretation  
21 noted above.

22 And the Ninth Circuit has since observed:

23 The purpose of section 549 . . . is to provide a just  
24 resolution when the debtor himself initiates an unauthorized  
25 postpetition transfer. The general rule in such situations is  
26 that the trustee is authorized to avoid the transfer in order  
to protect the creditors. . . . Section 549(c)<sup>4</sup> creates an

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27 <sup>4</sup> Which, pre-amendment (see footnote 1 above), provided:

28 (continued...)

1 exception to that rule to protect innocent purchasers whom the  
2 debtor has defrauded.

3 40235 Washington Street Corp. v. Lusardi, 329 F.3d 1076, 1081 (9th Cir.  
4 2003) (citing Schwartz; other citations omitted). Likewise, the court  
5 in In re Ford, 296 B.R. 537, 547 (Bankr. N.D. Ga. 2003) said:

6 [T]he bankruptcy trustee's power to "avoid" a transfer [under  
7 § 549] is the statutory power to set aside a transaction that  
8 was perfectly valid and legally effective when it occurred and  
9 remains valid until there is a judicial ruling that sets it  
10 aside. The statute specifies the legal principles under which  
11 valid transactions may be set aside, and also specifies  
12 protections for parties that acted in good faith prior to the  
13 time that a court sets aside the transaction. That makes  
14 sense since parties should be protected from judicial  
15 decisions that invalidate transactions that were perfectly  
16 proper when accomplished. But obviously no party may rely on  
17 a transaction that was invalid when it occurred.

18 (emphasis in original). And see In re Hill, 156 B.R. 998, 1007-09  
19 (Bankr. N.D. Ill. 1993):

20 The salient point the Trustee misses is that the automatic  
21 stay of section 362(a) and its text do not specifically  
22 prohibit the Debtor from voluntarily transferring an interest  
23 in property of the estate post-petition. Moreover, as noted  
24 in a learned treatise, "[t]he operative event cutting off the  
25 Debtor's power to dispose of its realty to a bona fide

26 \_\_\_\_\_  
27 <sup>4</sup>(...continued)

28 The trustee may not avoid under subsection (a) of this  
section a transfer of real property to a good faith  
purchaser without knowledge of the commencement of the case  
and for present fair equivalent value unless a copy or  
notice of the petition was filed, where a transfer of such  
real property may be recorded to perfect such transfer,  
before such transfer is so perfected that a bona fide  
purchaser of such property, against whom applicable law  
permits such transfer to be perfected, could not acquire an  
interest that is superior to the interest of such good faith  
purchaser. A good faith purchaser without knowledge of the  
commencement of the case and for less than present fair  
equivalent value has a lien on the property transferred to  
the extent of any present value given, unless a copy or  
notice of the petition was so filed before such transfer was  
so perfected.

(emphasis added).

1 purchaser is not the order for relief. It is the recording of  
2 the petition or a notice of the petition with the local office  
for recording transactions in real property."

3 Id. at 1009 (quoting R. Ginsberg and R. Martin, Bankruptcy: Text  
4 Statutes Rules, § 906[c][2] at 9-74 (3d ed. 1992). See also 5 Collier  
5 at ¶ 549.06 (§ 549(c) is intended to protect against the fraudulent sale  
6 of estate real property by a debtor to an innocent purchaser who has no  
7 knowledge of the pending bankruptcy case).

8 The dispositive question is whether the Ninth Circuit's reading of  
9 § 362(a) as not barring transfers initiated by debtors is law of the  
10 circuit, Hart v. Massanari, 266 F.3d 1155, 1171 (9th Cir. 2001), which  
11 we are bound to follow. The parties treat the Ninth Circuit's  
12 statements on the point as dicta, the trustee explicitly, and appellants  
13 implicitly - they do not assert those statements control, nor did they  
14 so argue to the bankruptcy court.

15 And, in fact, the Schwartz court was presented with a different  
16 question than we face here: the effect of a stay violation, rather than  
17 whether the stay was violated, so the quoted statement is outside the  
18 traditional concept of a "holding." See In re Osborne, 76 F.3d 306, 309  
19 (9th Cir. 1996) (stare decisis requires adherence to prior decisions -  
20 the legal consequences which follow from detailed sets of facts - rather  
21 than the rationales or statements underlying those decisions) and  
22 compare Tate v. Showboat Marina Casino Partnership, 431 F.3d 580, 582  
23 (7th Cir. 2005) ("[T]he holding of a case includes, besides the facts  
24 and the outcome, the reasoning essential to that outcome") (citation  
25 omitted).

26 But "we are not confined to the arguments of the parties on legal  
27 issues." In re State Line Hotel, Inc., 323 B.R. 703, 712 (9th Cir. BAP  
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1 2005) (citation omitted), and the Ninth Circuit has recently explicated  
2 its view on the binding authority of its reasoning:

3 What exactly constitutes "dicta," however, is hotly contested  
4 and judges often disagree about what is or is not dicta in a  
5 particular case. See United States v. Johnson, 256 F.3d 895,  
6 914-16 (9th Cir. 2001) (en banc) (Kozinski, J., concurring).  
7 In Johnson, Judge Kozinski explained that, "where a panel  
8 confronts an issue germane to the eventual resolution of the  
9 case, and resolves it after reasoned consideration in a  
10 published opinion, that ruling becomes the law of the circuit,  
11 regardless of whether doing so is necessary in some strict  
12 logical sense." Id. at 914; accord Cetacean Cmty. v. Bush,  
13 386 F.3d 1169, 1173 (9th Cir. 2004) (quoting Johnson); Miranda  
14 B. v. Kitzhaber, 328 F.3d 1181, 1186 (9th Cir. 2003) (per  
15 curiam) (same). Only "[w]here it is clear that a statement is  
16 made casually and without analysis, where the statement is  
17 uttered in passing without due consideration of the  
18 alternatives, or where it is merely a prelude to another legal  
19 issue that commands the panel's full attention, it may be  
20 appropriate to re-visit the issue in a later case." Johnson,  
21 256 F.3d at 915. Nevertheless, "any such reconsideration  
22 should be done cautiously and rarely--only where the later  
23 panel is convinced that the earlier panel did not make a  
24 deliberate decision to adopt the rule of law it announced."  
25 Id. If, however, "it is clear that a majority of the panel  
26 has focused on the legal issue presented by the case before it  
27 and made a deliberate decision to resolve the issue, that  
28 ruling becomes the law of the circuit and can only be  
overturned by an en banc court or by the Supreme Court." Id.  
at 916; see also Cetacean Cmty., 386 F.3d at 1173; Miranda B.,  
328 F.3d at 1186. This understanding of binding circuit  
authority was further articulated in Barapind v. Enomoto, 400  
F.3d 744 (9th Cir. 2005) (en banc) (per curiam), where we said  
that when a panel has "addressed [an] issue and decided it in  
an opinion joined in relevant part by a majority of the  
panel," the panel's decision becomes "law of the circuit."  
Id. at 750-51 (footnote omitted).

21 Padilla v. Lever, 429 F.3d 910, 916 (9th Cir. 2005) (emphasis added).

22 The Schwartz court engaged in a serious and detailed analysis of  
23 the applicability of § 362(a)'s automatic stay to transfers initiated by  
24 debtors, 954 F.2d at 573-74, and explicitly determined (en route to  
25 holding transfers in violation of the stay void) that debtor-initiated  
26 transfers were outside the stay's scope. The court focused upon that  
27 analysis, and the determination which followed was integral to the  
28 outcome, not merely some general expression in the course of the

1 opinion. See Central Virginia Cmty. Coll. v. Katz, \_\_\_\_\_ U.S. \_\_\_\_\_,  
2 2006 WL 151985, at \*4 (23 January 2006). We view Schwartz's  
3 articulation of the respective roles of §§ 362 and 549 as law of the  
4 circuit which we must apply.

5 It follows that Tippetts' deed to Coleman was not void, and, as the  
6 trustee asserts no other basis for the voidness or inefficacy of their  
7 deed - he did not seek to avoid the transfer under § 549(a) - the  
8 predicate for the bankruptcy court's ruling evaporates, and we must  
9 reverse. Although the parties, on the premise that the applicability of  
10 the stay to debtor-initiated transfers remains an open question, have  
11 ably argued policy, preemption, and plain meaning, we have no occasion  
12 to reach those issues, nor to address non-binding authorities, nor to  
13 explore the ramifications of the fact that the petition was not recorded  
14 under § 549(c).

15 And as the automatic stay was inapplicable, the question of  
16 annulment is moot. Likewise, as we are reversing, is the challenge to  
17 the bankruptcy court's limitation of the equitable lien in favor of the  
18 lenders to the amount of the pre-petition encumbrances.

19  
20 **VI. CONCLUSION**

21 Debtors' transfer of the Property was not violative of the stay,  
22 and was effective. We REVERSE No. 05-1087 and remand for entry of  
23 judgment in favor of Coleman and the Lenders.

24 As the automatic stay did not bar debtors' transfer of the  
25 Property, the appeal of the Annulment Order is moot, and we DISMISS  
26 No. 05-1086.